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CIMB BANK BHD v. JARING COMMUNICATIONS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HARMINDAR SINGH DHALIWAL J
[COMPANIES (WINDING-UP) NO: 28NCC-843-11-2014]
11 JUNE 2015

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COMPANY LAW: *Winding-up – Petition – Failure to pay judgment sum – Grounds for opposing winding-up petition – Whether company commercially solvent – Whether winding-up of company against public interest and oppressive – Whether company unable to pay debts within meaning prescribed in s. 218(1)(e) Companies Act 1965*

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By an agreement between the petitioner ('CIMB') and the respondent ('Jaring'), CIMB had made available two banking facilities to Jaring. Pursuant to an event of default by Jaring, CIMB commenced a suit against Jaring. Summary judgment in the said suit was entered for the sum of RM9,718,032.10 ('the said judgment'). Subsequently, a winding-up notice pursuant to s. 218 of the Companies Act 1965 ('CA') was served on Jaring based on the said judgment at both the registered and business address of Jaring. Receiving no response, CIMB proceeded to present the instant winding-up petition against Jaring. However, the winding-up petition was opposed by Jaring on the ground that it was commercially solvent. To support its contention, Jaring referred to the Suruhanjaya Syarikat Malaysia ('SSM') search dated 15 September 2014 to suggest that the respondent's non-current assets were RM17,527,185 with current assets of RM44,376,523 which upon realisation Jaring was able to pay its debts. Jaring further added that the shareholding of Jaring had been taken over by a new shareholder and had also secured multiple contracts and projects with government agencies and higher learning institutions. Further, in opposing the winding-up petition, Jaring contended, *inter alia*, that (i) the winding-up of Jaring was against public interest because it would cause irreparable damage and disruptions to government agencies and higher learning institutions which depended on Jaring's services; and (ii) the winding-up of Jaring was oppressive as CIMB had other avenues to enforce the said judgment instead of resorting to a winding-up petition.

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Held (allowing winding-up petition with costs):

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(1) It is trite law that 'being unable to pay its debts' within s. 218(1)(e) of the CA meant insolvency in the commercial sense or being commercially insolvent. The respondent company failed to comply with the demand in the s. 218 notice. The only so-called assets or crown jewel of the respondent were the contract which the respondent had with the parties. These contracts did not show that the respondent was commercially solvent. The revenue obtained from the contracts was uncertain as with every contract there were attendant risks. They were far less persuasive than other real assets which could be realised quickly

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at some future date. The same SSM search on 15 September 2014 also showed that the respondent suffered a loss of RM19,805,706 with current liabilities at RM55,436,518. Therefore, there could not be any genuine dispute that the respondent was indeed insolvent and ought to be wound-up. (paras 16, 18 & 19)

(2) The argument that irreparable damage and disruptions to government agencies should the respondent be wound-up were insufficient in law. If serious prejudice was going to be caused to the government agencies, these parties would have been present in court to oppose the petition. Instead, no government agencies had sought to oppose the petition but, there were supporting creditors to whom the respondent was also indebted to. In the event that it was in the best interest of all parties that the business of the respondent be continued, it was possible to do so with leave of court once the respondent was wound-up. Section 236(1)(a) of the CA conferred upon a liquidator the power to 'carry on the business of the company so far as is necessary for the beneficial winding-up thereof'. (paras 23, 24 & 25)

(3) The only ground alleged for oppressive conduct was that the petitioning bank could have resorted to other methods of execution. This could not, on its own, amount to oppressive conduct as a judgment creditor who remained unpaid on the judgment sum ought not be restrained from filling a petition to wind-up the defaulting company. It would be in public interest as well as sound policy that a company which had mired itself unmitigated debt ought not to be allowed to conduct further business. (paras 28 & 29)

(4) The company had shown itself to be unable to manage its financial affairs and it would be imprudent to allow other unsuspecting potential creditors from dealing with it. Therefore, the reasons advanced for opposing the winding-up petition were without merit. It was plain that the respondent was a company that was unable to pay its debts within the meaning prescribed in s. 218(1)(e) of the CA. (paras 29 & 30)

Case(s) referred to:

Juara Aspirasi (M) Sdn Bhd v. Tan Soon Ping [2012] 1 MLJ 50 ***(refd)***

Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd [2011] 1 LNS 1763 CA ***(refd)***

Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd [1980] 1 LNS 44 PC ***(refd)***

Sri Hartamas Dvpt Sdn Bhd v. MBf Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***

Legislation referred to:

Companies (Winding-Up) Rules 1972, r. 32

Companies Act 1965, ss. 176, 218(1)(e), (i), 221(2), 236(1)(a)

For the petitioner - Jeyanthini Kannaperan (YS Koo with her); M/s Shearn Delamore & Co
For the respondent - Goik Kenwayne (Afdhilani Jusoh with him); M/s Dennis Nik & Wong

Reported by Sandra Gabriel

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JUDGMENT

Harmindar Singh Dhaliwal J:

Introduction

B **[1]** This was a petition by CIMB Bank Berhad ("CIMB Bank"), the petitioner, to wind-up the respondent company, Jaring Communications Sdn Bhd. By an agreement ("the agreement") made between CIMB Bank and the respondent, the bank did agree to extend and did avail an overdraft facility of up to a limit of RM10,000,000 and a bank guarantee facility of up to a limit of RM8,000,000 (with a sub-limit of RM1,000,000) to the respondent.

C **[2]** Pursuant to an event of default by the respondent, CIMB Bank commenced Kuala Lumpur High Court Suit No. 22NCC-194-06-2014 against the respondent. The event of default occurred when the respondent, in breach of the express written terms of the said agreement, failed and neglected to obtain CIMB Bank's prior written consent and approval for D change in the respondent's directors and/or in the respondent's ownership structure and further failed to remain a wholly owned subsidiary of the Government of Malaysia for the tenure of the said facilities and had on 28 November entered into an agreement for sale of its entire shareholding in the respondent to Utusan Printcorp Sdn Bhd ("Utusan Printcorp").

E **[3]** Summary judgment in the said suit was entered on 29 August 2014 for the sum of RM9,718.032.10 outstanding as at 25 June 2014 on the said overdraft facility together with the agreed interest continuing from 26 June 2014 to the date of full and final realization. The judgment was later upheld by the Court of Appeal on 29 January 2015 when the respondent's appeal F against the same was dismissed with costs.

The Winding-Up Proceedings

[4] A statutory notice pursuant to s. 218 of the Companies Act 1965 ("Companies Act") dated 25 September 2014 was served on the respondent G on the judgment at both the registered and business address.

[5] Receiving no response, CIMB Bank proceeded to present the instant winding-up petition against the respondent following the respondent's breach and the same was served on the respondent's registered and business addresses.

H **[6]** At the first hearing of this petition, the court was informed that *vide* an order of court dated 19 January 2015 ("the 176 Order") made in Kuala Lumpur High Court Originating Summons No. 24NCC-13-01-2015, all proceedings or action against the respondent were restrained for a period of 90 days pursuant to a scheme of arrangement intended to be proposed I between the respondent and its creditors (including the petitioner) under s. 176 Companies Act. At the petitioner's request, the hearing of the petition was adjourned pending challenge/setting aside of the said restraining order.

[7] Meanwhile, the petitioner intervened in the proceedings for the 176 Order. On 26 March 2015, they successfully set aside the said 176 Order in so far as the order restrained all action or proceedings against the respondent for a period of 90 days. No appeal was lodged and in any event the s. 176 Order in so far as calling of creditors' meetings on the proposed scheme lapsed on 19 April 2015.

Hearing Of The Petition

[8] As there was no longer any impediment, the petition was fixed for hearing on 23 April 2015. It was determined that the cause papers were in order in that the Registrar's Certificate pursuant to r. 32 of the Companies (Winding-Up) Rules 1972 was obtained on 18 December 2014 and served together with all the cause papers on the Official Receiver on 9 December 2014. Dispensation of re-advertisement and gazetting pursuant to s. 221(2) of the Companies Act had earlier been granted at the case management on 23 March 2015. Mimos Bhd, a creditor of the respondent company for the sum of RM2,760,877.86, filed in their notice of intention to appear dated 31 December 2014. The petition was however opposed by the respondent.

The Respondent's Objections

[9] The respondent opposed the petition on several grounds. The grounds that merited consideration were:

(a) the respondent is commercially solvent;

(b) the winding-up of the respondent is against public interest; and

(c) winding-up of respondent is oppressive.

Commercially Solvent

[10] The petition to wind-up the respondent company was based on ss. 218(1)(e) and (i) of the Companies Act which read:

> 218. (1) The Court may order the winding up if -
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> …
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> (e) the company is unable to pay its debts;
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> …
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> (i) the Court is of opinion that it is just and equitable that the company be wound up.

[11] The respondent in resisting the winding-up petition sought to show that it was a solvent company. To support its contention, the respondent referred to the Suruhanjaya Syarikat Malaysia ("SSM") Search dated 15 September 2014 to suggest that the respondent's non-current assets are RM17,527,185 with current assets of RM44,376,523, which upon realisation, the company is able to pay its debts.

[12] The respondent further added that the shareholding of the respondent had been taken over by the Ministry of Finance and now its new shareholder ("Utusan Printcorp") in its effort to restructure the respondent and turning the company around had successfully secured multiple contracts and projects with various government ministries and agencies, government linked companies, Bank Negara Malaysia, Agensi Nuklear Negara, Lembaga Hasil Dalam Negeri, Majlis Amanah Raya Berhad, hospitals, higher institutions of learning and universities, just to name a few.

[13] The total value of the contracts awarded to and/or secured by the respondent had a book value of RM115,987,851.79 maturing at different stages in the next three years. These contracts, it was claimed are the primary assets and crown jewel of the respondent.

[14] It was further argued that the annual revenue based on the book value expected to be paid to the respondent for the next three years on an average is RM46,683,629.16. This sum, it was submitted, was sufficient to pay the petitioner's debt for the amount RM9,962,661.34 (as at 23 September 2014).

[15] The respondent further disclosed that it had also managed to obtain a financing facility of RM100,000,000 from Ikhtiar Factoring Sdn Bhd to finance the costs and expenses necessary for the ongoing projects mentioned above.

[16] Be that as it may, it is now trite law that "being unable to pay its debts" within s. 218(1)(e) of the Companies Act means insolvency in the commercial sense or being commercially insolvent. In dealing with "commercial insolvency", the Privy Council in *Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd* [1980] 1 LNS 44; [1980] 2 MLJ 53 approved of the passage from *Buckley on the Companies Act*, 13th edn. as follows:

> In such a case it is useless to say that if its assets are realised there will be ample to pay twenty shillings in a pound: this is not the test. A company may be at the same time insolvent and wealthy. It may also have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.

[17] The case of *Malayan Plant* and the passage from *Buckley* was approved and followed by the Supreme Court in *Sri Hartamas Dvpt Sdn Bhd v. MBf Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303; [1992] 1 MLJ 313. The Court of Appeal in *Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2011] 1 LNS 1763; [2012] 6 MLJ 817 after a consideration of the case authorities summed up the position as follows (at 828):

> In short, the question is not whether the debtor's assets exceed his liabilities as appeared in the books of the debtor, but whether there are moneys presently available to the debtor, or which he is able to realise in time, to meet the debts as they become due. It is not sufficient that the assets might be realisable at some future date after the debts have become due and payable.

The Court of Appeal in the same case also noted that "the solvency of the company counts for nothing if it is not ready, willing and able to meet the demand of the creditor". A

[18] In the instant case, it is significant that the respondent company failed to comply with the demand in the s. 218 notice. The onus fell on the respondent to show that it was able to pay its debts (*Sri Hartamas Dvpt*, *supra*). The only so-called "assets" or "crown jewel" of the respondent were the contracts which the respondent had with third parties. These contracts, in my view, do not show that the respondent is commercially solvent. The revenue to be obtained from these contracts is uncertain as with every contract there are attendant risks. They are, to my mind, far less persuasive than other real assets which could be realised quickly at some future date. B C

[19] Worryingly as well, the same SSM search of 15 September 2014 showed that the respondent suffered a loss of RM19,805,706 with current liabilities standing at RM55,436,518. In light of all the circumstances, there cannot possibly be any genuine dispute that the respondent is indeed insolvent and ought to be wound up. D

Public Interest

[20] The respondent contended that it was a company principally involved in communications, internet and related services. It was also one the oldest and largest internet service provider with the widest coverage catering and supplying services to individuals, corporations, higher learning institutions, government agencies, non-government agencies all over Malaysia. One of the main objectives of its incorporation is to support the education, research and commercialisation activities in Malaysia. E F

[21] It was submitted that the winding-up of the respondent is clearly against public interest. The respondent is a pioneer in this country as an internet services provider. It has reached out to and have connected millions of Malaysians to the internet since 1992 and continues to do so till to date.

[22] Further, the presentation and advertisement of the petition have caused serious and irreparable damage to the respondent, both its reputation and financial standing. The winding-up of the respondent will also cause irreparable damage and disruptions to the existing projects particularly services to the government agencies and higher learning institutions which depend on the respondent's services. It was submitted that in the interest of the public and in the best interest of all its creditors, the respondent should be allowed to complete its existing contracts to meet its obligation to its creditors. G H

[23] In this regard, I think the argument that irreparable damage and disruptions to government agencies should the respondent be wound up is insufficient in law. In *Juara Aspirasi (M) Sdn Bhd v. Tan Soon Ping* [2012] 1 MLJ 50, the Court of Appeal affirmed the decision of the High Court which I

A rejected a public interest argument made on behalf of the respondent, a developer, that the winding up order would prejudice some one hundred units which had been sold. The Court of Appeal accepted that the interest of the creditors prevailed over the company and its shareholders.

B **[24]** I think if serious prejudice was going to be caused to the government agencies that the respondent had contracts with, these parties would have been present in court to oppose the petition. Instead, no government agencies have sought to oppose this petition but there are in fact supporting creditors to whom the respondent is also indebted to.

C **[25]** I also note that in the event, it is in the best interest of all parties that the business of the respondent be continued, it is possible to do so with leave of court once the respondent is wound up. The private liquidators proposed would be more than able to do so. Section 236(1)(a) Companies Act confers upon a liquidator the power to "(a) carry on the business of the company so far as is necessary for the beneficial winding up thereof …".

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Winding-Up Oppressive

[26] It was contended by the respondent that the winding-up action here is oppressive and an abuse of process of the court as the petitioner had other avenues to enforce the judgment instead of resorting to a winding-up petition

E almost instantaneously.

[27] In this connection, I pause to note that allegations of oppressive conduct were also raised in the *Malayan Plant* case. The Privy Council dealt with such a submission and in dismissing allegations of oppression or unfairness observed (*supra* at 55):

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> Mr Newey relied strongly on what he described as the indefensible conduct of the petitioning Bank, to which reference has already been made. But no evidence of oppression or unfairness by the Bank was adduced, and it has to be said that, upon the available material, it is difficult to see in what respect their conduct is open to legitimate criticism.
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G It may be, for all one knows, that they could well have extended some indulgence to the Company, but they were under no obligation to do more in that way that they had already done, and it cannot be said that they were either unjust or inequitable in failing to do so … At the end of the day, beyond observing that to give the statutory notice demanding payment within three weeks was to ask the impossible, no concrete

H criticism of the respondent's conduct was advanced by learned counsel.

[28] In the instant petition, the only ground alleged for oppressive conduct was that the petitioning bank could have resorted to other methods of execution. In my view, this cannot, on its own, amount to oppressive conduct as a judgment creditor who remains unpaid on the judgment sum

I ought not to be restrained from filing a petition to wind up the defaulting company.

[29] It also needs to be emphasised that it would be in the public interest as well as sound policy that a company which has mired itself in unmitigated debt ought not to be allowed to conduct further business. This is simply because such a company has shown itself to be unable to manage its financial affairs and it would be imprudent to allow other unsuspecting potential creditors from dealing with it. For these reasons, criticism of oppression or unfair conduct on the part of the petitioning bank is unjustified.

Conclusion And Order

[30] In the circumstances and for the reasons stated, I am constrained to hold that the reasons advanced for opposing the winding-up are without merit. It is plain that the respondent is a company that is unable to pay its debt within the meaning prescribed in s. 218(1)(e) of the Companies Act. Accordingly, the petition to wind-up the respondent is granted in terms of prayer 11(i), (ii), (iii), (iv) and (v) of the petition with costs fixed at RM15,000. An oral application for stay was refused as the grounds advanced were insufficient to warrant stay.